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Summary record of the 826th meeting
Held at Headquarters, New York, on Wednesday, 28 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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The meeting was called to order at 3.20 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Amendment to article 35, paragraph 2, of the Arbitration Model Law

1. **The Chairman** invited the Commission to consider the amendment to article 35, paragraph 2 of the Arbitration Model Law, as proposed by the Working Group in document A/CN.9/606. The relevant comments were contained in paragraph 22.

2. **Mr. Graham Tapia** (Mexico) proposed that the word "certified" should be deleted in the second sentence of amended article 35, paragraph 2. The sentence would therefore read: "If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language." His delegation was proposing the deletion of the word "certified" because there had been cases where an application for enforcement of an award had been presented to a State court and the requirement to supply a certified translation had led to more controversy or litigation. His delegation was of the view that national procedural laws, rather than the Arbitration Model Law, should be applied in cases where a party alleged that the translation was not correct.

3. **Mr. Martens** (Germany) endorsed the Mexican proposal provided that the word "certified" was also deleted before the word "copy".

4. **Ms. Perales Viscasillas** (Spain) said that her delegation was in favour of amending article 35, paragraph 2, and that it supported the Mexican proposal. Unlike the original text, which provided that the party must supply a duly certified translation, the amended version left it to the discretion of the court whether or not to request a translation. It was therefore logical that the court should decide whether or not it wished that translation to be certified. Her delegation also supported the German proposal to delete the word "certified" before the word "copy", in the interests of flexibility. The certification requirement would become particularly problematic in cases where awards were issued electronically.

5. **Mr. Markus** (Switzerland) said that, while his delegation supported the Mexican and German proposals, it wished to avoid giving the impression that the judge did not have the possibility of requesting a certified copy of the award, if he or she doubted its authenticity. It might therefore be advisable to include a clarification of that point in the explanatory material.

6. **Mr. Möller** (Observer for Finland) said that his delegation was also in favour of amending paragraph 2 and supported the proposals to delete "certified" in front of "translation" and "copy", on the understanding that national courts had the authority to request certification if they deemed it necessary.

7. **Mr. Sandoval López** (Chile), supported by the representatives of Sweden and Qatar, endorsed the proposals to delete "certified" in front of "translation" and "copy".

8. **Mr. Castello** (United States of America) said that his delegation was in favour of deleting "certified" in both cases. However, because the original footnote to paragraph 2 provided that "the conditions set forth in this paragraph are intended to set maximum standards", the explanatory material should clearly state that individual judges had the authority to require certification if they doubted the authenticity of the award or the translation.

9. **The Chairman** said he took it that the Commission wished to adopt the amendment to article 35, paragraph 2, as set forth in document A/CN.9/606, with the deletion of the word "certified" before "copy" and "translation". He also took it that the Commission wished to clarify, in the explanatory material, that the judge had the authority to request certification under local law.

10. *It was so decided.*

Explanatory material

11. **The Chairman** invited the Commission to turn to paragraphs 23 and 24 of document A/CN.9/606, entitled "Explanatory material".

12. **Mr. Sorieul** (International Trade Law Division) said that paragraph 24 of document A/CN.9/606 dealt with the possibility of including in the Arbitration Model Law a provision along the lines of article 7 of

the United Nations Convention on Contracts for the International Sale of Goods, which was designed to facilitate interpretation by reference to internationally accepted principles. A similar provision had been included in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Cross-Border Insolvency. The Commission should consider whether it wished to adopt such a provision and if so, whether it wished the provision to apply to the Arbitration Model Law as a whole or solely to chapter IV bis.

13. **The Chairman** suggested that article 3 of the Model Law on Electronic Commerce could serve as a model for the aforementioned provision, as it had done in the case of other UNCITRAL texts, including the Model Law on Cross-Border Insolvency. The text of article 3 could be found in footnote 29 of document A/CN.9/606.

14. **Ms. Perales Viscasillas** (Spain) pointed out that the provision contained in article 3 of the Model Law on Electronic Commerce had been copied verbatim in other international texts. Her delegation was of the view that it would be appropriate to introduce a similar provision in the Arbitration Model Law and to apply it to the entire Model Law.

15. **Mr. Komarov** (Russian Federation) said that that text should definitely be included. It was already part of many international instruments and would facilitate understanding of the uses to be made of the Model Law. Judges, using case on UNCITRAL texts (CLOUT), would be able to apply relevant national laws in a unified way.

16. **Mr. Rodríguez** (Paraguay) observed that the text had entered Organization of American States (OAS) legislation, as article 4 of the Inter-American Convention on the Law Applicable to International Contracts.

17. **The Chairman** said he would take it that the Commission wished to include the text reproduced in footnote 29 in the Arbitration Model Law, leaving it to the secretariat to determine the proper placement.

18. *It was so decided.*

19. **Mr. Sorieul** (International Trade Law Division), referring to the form and content of the explanatory material, as discussed in document A/CN.9/606, paragraph 23, said that the Working Group had initially suggested placing the explanatory material in an expanded version of an earlier explanatory note by the secretariat of no more than a dozen pages. That would mean covering amended articles 7 and 17 in two or three paragraphs at the most, which was probably too succinct. Others had suggested issuing the explanatory material as a guide supplementary to the Arbitration Model Law, as had been done in the case of later UNCITRAL model laws, thereby giving scope for more detailed information. The secretariat would appreciate the Commission's guidance as to format before it prepared the explanatory material, in consultation with experts, for submission to the Working Group or the Commission.

20. **The Chairman** said that the Commission's practice had evolved with regard to the inclusion of explanatory material. Initially, when the Arbitration Model Law had been adopted in 1985, the supplementary material had consisted of a brief commentary giving the legal background. Subsequently the secretariat had begun elaborating fuller explanatory notes for UNCITRAL instruments; and, as the problems States were experiencing in implementing model laws became more apparent, guides on enactment were developed for legislators, in which explanations for users were subsequently included.

21. The Working Group had thought it strange to issue such a guide to enactment and use in the case of the amendments to the Model Law and had decided rather that the secretariat should expand the original explanatory note to incorporate comments on the changes. However, since the Commission had now decided to add a great deal of explanatory information — which, if incorporated into the original explanatory note, would give disproportionate treatment to articles 7 and 17 — that decision should probably be reconsidered in favour of a guide.

22. **Mr. D'Allaire** (Canada) asked whether the guide would be prepared by the Working Group.

23. **Mr. Sekolec** (Secretary of the Commission) said that the amount of the Commission's input into the preparation of guides varied. In the present case, he believed that it was not worth convening the Working Group, since the secretariat should be able to prepare the necessary material in time for the following session.

24. A guide to enactment of the new provisions adopted could of course be prepared, but if it stood

alone, it would seem curious that no guidance was being given on the other provisions of the Model Law. By drawing on the original commentary on the 1984 draft model law, the secretariat would be able to prepare a unified, balanced text covering the whole Model Law.

25. **Mr. Sandoval López** (Chile) said that his delegation would opt for a guide that covered the entire Model Law.

26. **Ms. Illescas-Ortiz** (Spain) said that unless the new guide replaced the explanatory note, it would be best to add to the latter some short paragraphs about the new provisions and about the new guide to enactment.

27. **Mr. Chan** (Singapore) observed that the proposed guide would deal solely with the enactment of laws based on the new provisions. Another problem was that the Model Law was enacted differently depending on a country's legal system. The guide could be useful if it gave a practical compendium on how to use the Model Law, including for purposes of enactment. A new term to describe such a guide was needed.

28. **Mr. Sekolec** (Secretary of the Commission) said that it would strain the secretariat's resources to prepare a compendium of legislative history and practice, which would require the secretariat to embark on a long, expensive process involving, inter alia, many discussions with States. UNCITRAL usually limited itself to the history and purpose of the provisions of a model law and how they could be enacted.

29. **Mr. Castello** (United States of America) said that his delegation favoured the narrower project of a guide over the broader project of a compendium. A guide to enactment and use, covering the whole Model Law, and distilling the reasoning of the Working Group and the Commission behind the adoption of certain provisions, would be a very useful document. He suggested that once the secretariat had completed the project, it should submit a draft to the Working Group for review. Additional paragraphs regarding the amended articles should first be developed for inclusion in the explanatory note, and then the larger project on the guide could begin. He shared the Secretary's concerns regarding the Singaporean proposal. He would point out also that the purpose of a guide to enactment and use was to further the adoption of a model law and the harmonization of legislation and that that purpose would not be served by highlighting variations in State practice.

30. **The Chairman** said he took it that the Commission wished the secretariat to draft a guide to enactment and use of the Arbitration Model Law, for submission to the Commission at its next session.

31. *It was so decided.*

Draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention

32. **Mr. Sekolec** (Secretary of the Commission) said that the draft declaration contained in document A/CN.9/607 had been under consideration by the Working Group for some time and discussed on various occasions. The draft declaration aimed at harmonizing the interpretation of the Convention. During the discussions questions had been raised as to whether it should be up to the Commission or the General Assembly to issue such a declaration, the role of the States parties to the Convention and other issues. It had been decided that it was the responsibility of the Commission to issue a statement to that effect. The basis for the mandate to do so was contained in General Assembly resolution 2205 (XXI) of 17 December 1966, which had established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade.

33. Some delegations had suggested that the word "declaration" should be replaced by the less forceful word "recommendation". It had also been suggested that a passage from the aforementioned resolution stating the Commission's mandate to promote and ensure a uniform interpretation of international treaties should be included in the text.

34. The title of the text would therefore read: "Recommendation regarding interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, adopted by the United Nations Commission on International Trade Law on 6 July 2006 at its thirty-ninth session". In preambular paragraph [1] of the text, after "law of international trade", the following words would be added: "by, inter alia, promoting ways and means of ensuring a uniform interpretation and

application of international conventions and uniform laws in the field of the law of international trade". As a consequential change, the following words should be deleted in paragraph 4: "by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade".

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

35. **The Chairman** invited the Commission to consider the text contained in document A/CN.9/607, as amended.

36. **Mr. D'Allaire** (Canada) said that, as his delegation had had reservations about the use of the word "declaration", it welcomed the suggested change made by the secretariat. He would like further clarification on which body was issuing the recommendation and for whose benefit. More information was also needed on the role of the General Assembly with respect to that recommendation. The information provided by the secretariat seemed to suggest that the recommendation would be adopted by the Commission and transmitted to the General Assembly, which would subsequently take note of it.

37. **Mr. Sekolec** (Secretary of the Commission) said that the question of addressees had been discussed at an early stage of consideration of the text. The main addressees were not States; rather they were those who would be in a position of interpreting the New York Convention, including judges, arbitrators and the parties which would have to argue their case. Governments would also be included, because they were parties to the Convention. It had been decided that, as it would be difficult to enumerate all the addressees in the text, it would be preferable to refer to them in general terms. Concerning the role of the General Assembly, it should be borne in mind that UNCITRAL was the body which finalized and adopted the outcome of its work. Model laws were adopted by the Commission and bore its name. The General Assembly gave its endorsement of or appreciation for the action by the Commission, or recommended that Member States should enact its instruments. Such matters were the responsibility of the Sixth Committee for consideration and the General Assembly for adoption. The General Assembly might, for example, take note with appreciation that the Commission had modernized its model law and clarified some uncertainties concerning the relationship between the Arbitral Model Law and the New York Convention.

38. **Mr. Cachapuz de Medeiros** (Brazil) said that clarification was needed on the precise meaning and effects of the declaration. While the Convention had been produced by UNCITRAL, it now belonged to the States parties. Therefore, only the States parties could interpret it. The Commission could propose an amendment to the Convention or a new convention to replace the New York Convention. His delegation had doubts, however, as to whether the Commission could by itself interpret the Convention. The most that it could do was to suggest an interpretation to States.

39. **Mr. Markus** (Switzerland) said that his delegation welcomed the amendment suggested by the secretariat, which it considered to be important. It had shared the concerns of the representative of Brazil, but given that the text would be considered a recommendation by the Commission, and not by the General Assembly, his delegation no longer had concerns over its wording. The text, which was a guide to interpreting the Convention rationally, was not intended to be an authoritative text. Otherwise, it might be taken that the Commission, or indeed the General Assembly, was attempting to alter an international convention. It was up to Member States to make any changes through a formal process. In conclusion, his delegation was entirely satisfied with the text, as amended. Furthermore, the text was in keeping with the tradition of previous Commission decisions on model laws, which constituted a digest to guide practitioners in the best ways of interpreting the text of a given model law.

40. **Mr. Möller** (Observer for Finland) said that his delegation had been critical of such declarations, because it was up to the courts to apply the Convention. It had also been unclear whether in instances where there was case law concerning article II such a declaration would have much effect. The word "recommendation" was less aggressive than "declaration" and therefore more in keeping with the nature of the document.

41. **The Chairman** said he took it that the Commission wished to adopt the title and paragraphs [1] to [3] of the draft contained in document A/CN.9/607, paragraph 4, as amended.

42. *It was so decided.*

43. **Mr. Dervaird** (United Kingdom) said that in the light of the proposed amendment to paragraph [1] there was no longer any need for paragraph 4.

44. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to delete paragraph [4].

45. *It was so decided.*

46. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to adopt paragraphs [5] to [10].

47. *It was so decided.*

48. **Mr. Castello** (United States of America), with respect to paragraph 11, said that as case law was not usually referred to as being enacted the word "including" before the phrase "case law" should be replaced by "as well as".

49. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to adopt paragraph [11], as amended, paragraphs 12 to 14, and the entire text of the draft recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, as amended.

50. *It was so decided.*

The meeting rose at 5.35 p.m.